71-1480

FILED
MAY 13 1972
MICHAEL RODAK, JR., CLERK

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IN THE

# Supreme Court of the United States

October Term 1971

No. .....

FERRIS JACOB ALEXANDER
*Petitioner*

vs.

UNITED STATES OF AMERICA

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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May 12, 1972

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Ferris Jacob Alexander, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered April 14, 1972, denying Petitioner's motion made pursuant to the provisions of *28 U.S.C. 2255*. The Second Circuit rendered no opinion when it denied Petitioner's motion.

## JURISDICTION

The jurisdiction of this Court is invoked under *28 U.S.C. 1254(1)*.

## QUESTIONS PRESENTED

1. Whether Petitioner was denied a fair trial under the due process provisions of *Amendment V, Constitution of the United States* and was denied effective assistance of counsel as required by *Amendment VI, Constitution of the United States*, where

   a. Proof of alleged criminal conduct by Petitioner depended upon the testimony of a government witness who could not make a positive identification as between petitioner and a co-defendant, both of whom were represented by the same counsel on the same charge where throughout the trial petitioner's counsel was laboring under an undisclosed conflict of interest by his known representation of three co-defendants hindering his decision whether to allow petitioner to testify and call the severed co-defendant as a witness where the testimony of petitioner and co-defendant would be exculpatory for petitioner but inculpatory for the co-defendants, and

   b. The Government, anticipating the inability of their witness to make an identity between the two co-defendants, caused a severance of one co-defendant, represented by the same counsel as that of Petitioner, and thereby created a suggestive in-court identification of Petitioner and failed to disclose to the Court and counsel for Petitioner prior to trial the witness' inability to identify petitioner and another co-defendant, and

   c. The Trial Court failed to inquire whether the defendant was able to make a knowing and intelligent decision as to choice of counsel who also represented co-defendants to petitioner's prejudice.

2. Whether the trial court denied petitioner's Fifth and Sixth Amendment rights in denying petitioner a new trial pursuant to Title 28 U.S.C. Sec. 2255 where the averments of petitioner's motion were uncontroverted by the Government that petitioner's attorney represented three additional co-defendants in the same matter and the trial court made a finding that there was no dual representation dehors the record without hearing.

## STATEMENT OF THE CASE

Following a jury trial in the United States District Court for the Southern District of New York (MacMahon, Jr., presiding), appellant was convicted on two counts charging him with transporting obscene material in interstate commerce for the purpose of sale and distribution, in violation of 18 U.S.C. 1465, and on one count charging him with conspiring to do so, in violation of 18 U.S.C. 371. He was sentenced to three concurrent terms of imprisonment of eighteen months and fined $20,000. The Court of Appeals for the Second Circuit affirmed the conviction on July 7, 1971 (*United States v. Manarite et al.*, 448 F. 2d 583, and, on November 9, 1971, the Supreme Court denied a petition for writ of certiorari (404 U.S. 947).

Following incarceration, appellant filed a motion under 28 U.S.C. 2255 to vacate his sentence on the ground that his retained trial attorney was laboring under a conflict of interest. On February 29, 1972, Judge MacMahon denied the motion without a hearing on the ground that the claim was refuted by the files and records of the case.

On April 14, 1972 the Court of Appeals for the Second Circuit denied Petitioner's appeal without an opinon.

The Petitioner, in support of his Motion, alleged that counsel who represented him at the trial of the action herein was laboring under such a severe conflict of interest that it rendered him incapable of adequately defending him in terms of the Sixth Amendment.

Petitioner's complaint of conflict of interest rested upon the facts which were made clear to him after the conclusion of his trial. The indictment herein named the Petitioner along with fourteen other co-defendants, including the Petitioner's brother, Edward Jacob Alexander. Both the Petitioner and his brother retained Herald Price Fahringer of Buffalo, New York, to represent them in this litigation. Fahringer, at the time he was retained by the Alexanders, represented co-defendants Max Bornstein and Paul Wolf. Wolf did not respond to the processes of the Court and remains a fugitive. Prior to trial, Fahringer advised Bornstein to retain other counsel and represented to the Court that this substitution was due to a possible conflict of interest. Ultimately it became clear that Fahringer still maintained a degree of loyalty and responsibility to both Wolf and Bornstein in his representation of the Alexander brothers. This basic conflict was compounded by the fact that there was a strong conflict of interest between the Petitioner and his brother who was severed prior to the trial. Despite this severance, the conflict remained apparent. The trial transcript disclosed that the Petitioner was implicated by his alleged meetings with one of the Government's principal witnesses, Bruce Valentine. These meetings allegedly effected the transportation of obscene materials from New York to Minneapolis, Minnesota. The testimony of this witness demonstrated confusion as to which of the Alexander brothers was involved on specific occasions. The Petitioner's involvement in that conspiracy and substantive acts could have

been easily negated if it were shown, as the Petitioner alleged the fact to be, that it was his brother Edward Jacob Alexander, who met with various co-conspirators during the alleged period of the conspiracy. It is respectfully submitted that the fact that one brother claims to have participated in some degree while the other brother denied participation, is in and of itself, a classic example of conflict of interst which counsel had an obligation to reveal.

This basic conflict is complicated by the fact that Petitioner's brother, Edward Jacob Alexander, made repeated efforts to testify on his brother's behalf after learning that the Petitioner had been erroneously implicated and that each of these efforts was rebuked by Fahringer. Moreover, Petitioner, who had never previously been convicted of a crime, strongly asserted his desire to testify and make clear that it was not he who met with the co-conspirators' witness, Bruce Valentine.

Both Alexanders, after conferring with Fahringer, made it known that their testimony would not only exculpate the Petitioner but would strongly implicate Paul Wolf and Max Bornstein, who was ultimately acquitted. However, Fahringer was faced not only with a dilemma concerning the two brothers but with a trilemma which reflected his loyalty not only to the Alexanders but to Bornstein and Wolf, who is still subject to be tried. This division of loyalty, it is submitted, resulted in an acute deprivation of Petitioner's right to be adequately represented by counsel. Petitioner did not challenge the competence of counsel which he retained, however, this conflict of interest, undisclosed by counsel, reached equal Constitutional importance.

This Court had affirmed Petitioner's conviction and dismissed Petitioner's claim as to sufficiency of evidence by stating at 4041, 2:

"In January, 1969 Ferris Alexander came to New York and ordered some hard core materials from Portella and Portella told Alexander that he would send him these materials."

Fahringer did not allow Petitioner to testify that it was not he who was in New York, nor would he call Edward Alexander to testify that he was in New York, January, 1969. Before the Grand Jury the Government's witness testified that it was the younger Alexander brother (Edward) who met in New York. Again, the importance of whether Petitioner or his brother was in New York is apparent from page 4046 of the Circuit Court's opinion. The Court stated:

"On this record it is obvious that Alexander must have known this material which was delivered to him in quantities of 10,000 copies at a time was also being distributed to other dealers. He visited Portella in New York and must have been aware of the nature and extent of the conspiracy and its operation. See *United States v. Aiken*, 373 F. 2d 294 (2d Cir. 1967), cert. denied, 389 U.S. 833 (1967)."

Had it been known that Petitioner did not in fact travel to New York in January, 1969 but that Petitioner's brother was in fact in New York at that time it could not have been said that, "Petitioner ordered some hard core materials" or that he "must have been aware of the nature and extent of the conspiracy and its operation."

At the trial Bruce Valentine, a Government witness, made an in Court identification of Petitioner. Fahringer did not request a hearing to determine the circumstances surrounding this identification. The trial transcript reproduced below shows

that the Government's witness could not make a positive identification as between Petitioner and Edward Alexander a co-defendant.

Q. Okay. Now, going back to the Grand Jury, do you recall being asked whether you know Ferris Alexander, Edward Alexander?

A. Yes, I do.

Q. Did they ask whether they resided in Minneapolis and you said yes?

A. Yes.

Q. Were you asked and did you give the answer that you dealt with the younger brother?

A. Well, I don't know—I know what that says there, yes, I was asked that.

Q. Did you say that?

A. Yes.

Q. Is Edward Alexander younger than Ferris Alexander?

Mr. Scott: Objection, your Honor.

The Court: If he knows. Overruled.

Q. Did you testify before the Grand Jury that you know Edward Alexander is younger than Ferris?

Q. And at that time, certain questions were put to you under oath, isn't that true?

A. True.

Q. And do you remember yesterday telling us about dealing with Mr. Alexander here?

A. Yes.

Q. And do you recall being asked in the Grand Jury about the Ferris brothers? Do you recall being asked that?

A. Yes.

Q. Do you remember telling them that you knew the Ferris brothers as Jacob Alexander—that would be Edward Jacob Alexander and Ferris Alexander; do you recall that?

A. No, I don't.

Q. Referring now to the Government's Exhibit 3504, would you just read that question and the answer?

Can you read it all right? As a matter of fact, to save some time, would you just read right straight down that page, please, for me.

Incidentally, do you know how many cartons were involved, actual boxes, involved in the first trip to Minneapolis?

A. No, I don't. I don't recall.

Q. You have no idea at all?

A. It was over ten cartons.

A. I really wouldn't know which is which.

Q. I am concerned about what you testified before the Grand Jury, Mr. Valentine. Let me show you the question.

Were you asked which brother, and did you say the younger brother?

The Court: That is repetitious. He has already told us that is what he said.

Q. And did you say the younger brother is Edward Alexander?

A. Yes, I did.

Q. All right. And that was under oath?

A. That's right.

Q. Was that the truth?

A. I don't know whether or not—

Q. To the best of your ability was that the truth?

A. To the best of my ability, yes, that was the truth.

Q. And did you also indicate before the Grand Jury that it was the younger brother that gave you the money?

A. I don't think I did.

Q. May I ask you to read this portion right here, please.

A. Yes.

Q. Did you say the younger brother would come back and pay you?

A. Yes, I did.

Q. Now let me ask you this. Have you had an opportunity to review your Grand Jury testimony?

A. I have read it, yes.

Q. In other words, before you came in here and testified the other day, didn't the government attorneys give you your Grand Jury testimony and ask you to read it over?

A. Yes, they did.

Q. Didn't they tell you that you might be examined on it or you might be shown portions of it that you would have to remember?

A. Yes, they did.

Q. And so you had an occasion to read your Grand Jury testimony over in preparation of testifying here, isn't that so?

A. Yes, I did.

The Government's affidavit and response to the Petition showed that its attorney spoke with Fahringer after the Petition was filed. The Government did not deny Fahringer's divided loyalty.

Although the Government submitted various exhibits attached to its affidavit in opposition to the Petition the Govern-

ment's only defense was that another attorney, this writer, also represented Petitioner at the trial, that the attorney who prepared the petition also represented a co-defendant and somehow because of this the Petitioner cannot complain that a conflict rendered his first attorney's representation insufficient, and that Fahringer instructed Ferris and Edward Alexander prior to the trial, "that he definitely would defend one and only one of them at trial if they both went to trial."

The Government did not allege that this writer participated in any of the decisions including whether or not Ferris Alexander would testify, call witnesses or waive a mistrial. The Government did not allege that Fehringer severed the attorney-client relationships he established with the three other co-defendants he represented. The Government did not contest that Fahringer represented three other co-defendants at least through the motion stages of the proceedings. The Government did not contest that Fahringer had received retainers from at least two co-defendants. The Government did not allege that any retainers were returned by Fahringer. The Government did not contest that Fahringer retained at least a subconscious loyalty and sense of responsibility to three other co-defendants. The Government did not contest that Petitioner wished to testify at the trial and his testimony would have exculpated himself and inculpated his brother, Edward, and Fahringer's other clients. The Government did not contest that Petitioner's brother Edward Alexander was willing to testify and Edward's testimony would have inculpated Edward but would have exculpated Petitioner. The Government did not contest that Petitioner desired to call his brother Edward as a witness. The Government did not contest that Petitioner was prevented from testifying and from calling witnesses by his attorney, Fahringer. The Government did not contest that a mistrial was declared because of prejudicial remarks made by a co-

defendant in the presence of the jury but that Fahringer declined the mistrial without first consulting Petitioner. The Government did not contest that Fahringer's determination not to call Petitioner, Edward Alexander and other witnesses to testify and whether to accept a mistrial were all hindered by Fahringer's divided loyalty between Petitioner and his other clients. The Government submitted no affidavit of Harold Fahringer. There were no facts in dispute and consequently no hearing was necessary. The Court found the above grounds to be frivolous and denied Petitioner's Petition to vacate the sentence.

The Trial Court based its denial upon the following memorandum:

> "The files and records of this Court show beyond preadventure that Herald Price Fahringer, Esq. did not represent Ferris Jacob Alexander in any real sense upon the trial until he had ceased to represent other defendants. Additionally, Robert J. Milavetz, Esq. represented Ferris Jacob Alexander throughout the trial. The record is plain that on the trial proper Mr. Fahringer represented only Ferris Jacob Alexander. The supporting affidavit of James M. LaRossa, Esq., who has since withdrawn from this application because "the manner in which Mr. Alexander seeks to secure habeas corpus relief is wholly incompatible with my own standards of professional responsibility," and the affidavit of Mr. Milavetz wholly fails to show any facts pointing to any specific instance of prejudice or real conflict of interest. In short, this application is frivolous and is therefore denied without a hearing. 28 U.S.C. 2255. *United States v. Lovano*, 420 F. 2d 769 (2 Cir.) cert. denied 397 U.S. 1071 (1970). *Hussey v. LaVallee*, 428 F. 2d 457 (2 Cir. 1970), cert. denied, 460 U.S. 995 (1971).

## REASONS FOR GRANTING THE WRIT

### 1. The decision below in its affirmance of the Trial Court's decision conflicts with Glasser v. United States, 315 U.S. 60 1942.

Important questions are raised as to an attorney's undertaking to represent a defendant where he has duties to co-defendants whom he is not appearing for as counsel during the trial.

Almost three decades ago, this Court, in *Glasser v. United States*, 315 U.S. 60 (1942), made it clear that a conviction cannot stand where a conflict renders counsel's representation less effective than if the conflict did not exist. In *Campbell v. United States*, 352 F. 2d 359 (D.C. Cir. 1965), the Court held that the Trial Court has a duty to inquire as to whether a conflict exists where counsel represents more than one defendant. *Campbell* and other decisions of the various Circuit Court of Appeals have made it clear that the fact that defendant's counsel is retained rather than appointed does not bar a later claim that the conflict resulted in Sixth Amendment deprivation. *Craig v. United States*, 217 F. 2d 355 (6th Cir., 1954); *Larry Buffalo Chief v. State of South Dakota*, 425 F. 2d 271 (8th Cir., 1970). In *Larry Buffalo Chief* the Court stated that:

> "The right to the assistance of counsel means knowledgeable counsel who is unhampered or unfettered in his professional responsibility to the accused. This right to effective assistance of counsel is not necessarily waived because a defendant chooses to be represented by the attorney of his co-defendant". P. 278, 279.

Here, it is clear that counsel's representation was not unhampered in his responsibility to the Petitioner. At the very least, counsel was laboring under a responsibility to another defendant and possibly to three other defendants. In *Sawyer v. Braugh*, 358 F. 2d 70 (4th Cir., 1966), the Court demonstrated that when one co-defendant admits guilt and the other defendant denied any connection with the crime, there is a clear conflict. This is unquestionably analagous to the case at bar. See also, *Lugo v. United States*, 350 F. 2d 858 (9th Cir., 1965).

In *Porter v. United States*, 298 F. 2d 461 (5th Cir., 1962), the Circuit Court in reversing the conviction and ordering a new trial, held that a conflict existed where the Petitioner's attorney represented an individual who was not on trial but who was involved with the factual allegations in the indictment. Petitioner claimed that because of this conflict, evidence which was vital and beneficial to the defense, was withheld from the jury. Similarly in the instant case, counsel's divided loyalty resulted in the withholding of evidence favorable to the accused, specifically the testimony of the Petitioner and his brother.

Another decision which speaks to the issue at bar is found in *Holland v. Boles*, 225 F. Supp. 863 (N.D. West Vir. 1963). In *Holland*, the Petitioner was indicted with her sister for first degree murder. It was later developed that evidence existed which would demonstrate that one sister was solely responsible for the acts alleged. The Court, in granting the Petition, stated that the attorney

> ". . . was laboring under the impossible task of correctly and effectively advising two clients with divergent interests".

The Court went on to say that:

> "The law is clear that such an attempt to serve two masters with conflicting interests rendered the attorney incapable of giving to either the impartial, disinterested and effective representation that is the Constitutionally-protected right of each." P. 865.

In the case at bar, the facts reveal an unquestionable conflict which has accordingly deprived Petitioner of basic and fundamental Constitutional guarantees.

2. Important questions are raised as to the duties of disclosure by a prosecutor and of his conducting a fair trial.

The Government's conduct in severing a co-defendant for the purposes of aiding an in court identification of Petitioner without then disclosing the inability of their witness to distinguish between Petitioner and his brother to the Court and to Petitioner's counsel who also represented Petitioner's brother violated defendant's Fifth and Sixth Amendment rights and the duties imposed upon prosecutors by *Brady v. Maryland*, 373 U.S. 83 (1962), and other decisions of this Court.

The Government knew that the witness Valentine was in doubt as to the identity as between Petitioner and his brother, and figured that if both Petitioner and his brother were in the court room at the same time in the same trial, Valentine could not make a positive identification as between the two of them. The Government, to avoid the circumstance of their witness to distinguish between the two, caused the brother to be severed from the case and therefore to be absent while Valentine testified. Because Petitioner and his brother were represented by the same lawyer, the brother, naturally ab-

sented himself from the proceedings, leaving Petitioner alone to be singled out by the witness Valentine to be identified as the person who had allegedly engaged in the conduct charged in the indictment. The Government, Petitioner respectfully submits, was playing games by reason of the frailty of their witness Valentine to make an identification as between Petitioner and his brother and in so doing the Government created a circumstance which resulted in a suggestive in-court identification.

The Government further exploited the circumstance that Petitioner and his brother were represented by the same counsel. In so doing, the Government thrust upon counsel for Petitioner and his brother the questions: Whom should I protect? Petitioner or his brother? If I object to the Government's motion to sever the brother, I will be harming him? At the same time, because of the Government's failure to disclose Valentine's inability to make a positive identification as between Petitioner and his brother, am I justified in acquiescing in the Government's motion for severance of the brother?

The United States attorney had an affirmative duty to advise the Court in the case at bar of Fahringer's soon to be discovered dilemma. The Government extricated itself from the quagmire of its witness's change in testimony by severing Edward Alexander but buried Petitioner deeper by depriving him of effective assistance of counsel and of a fair trial in not disclosing this. This Court has required new trials where the Government deceives the Court since at least as early as *Mooney v. Hollihan*, 294 U.S. 104, 55 S. Ct. 340 (1935), and as recently as *Giglio v. United States*, 404 U.S. ——, 92 S. Ct. 763 (February 4, 1972). See also *Brady v. Maryland*, 373 U.S.

83, 83 S. Ct. 1194 (1962); *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173 (1959). The Code of Professional Responsibility adopted by the American Bar Association on August 12, 1969 Canon 7-13 states:

> "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."

This Court has not stated whether Brady applies also prior to trial. The Government should have discosed the exculpatory evidence prior to trial for it to be meaningful. Please see *United States v. Westmoreland*, 41 FRD 419 (S.D. Ind.); *U. S. v. Gleason*, 265 F. Supp. 880 (S.D. N.Y.); *U. S. v. Morrison*, 43 FRD 516 (N.D. Ill., 1967).

3. Important questions are raised as to the proper role of a trial Judge in safeguarding a defendant's Fifth and Sixth Amendment rights from a possible conflict of interest by his attorney and there is a conflict between the Circuits as to the duty of the trial Judge to inquire as to whether a defendant is able to make a knowing and intelligent decision as to a defendant's choice of counsel who also represented co-defendants.

Compare *Campbell v. United States*, 332 F. 2d 359 (D.C. Cir. 1965), with *Paz Sierra v. United States*, 367 F. 2d 932 (2 Cir. 1966).

The trial Judge made no inquiry at the trial as to the possible conflict of interest either at the time of the Government's motion for severance or at the time of the Government's witness' testimony revealing his inability to distinguish between Petitioner and his jointly represented brother.

*Glasser v. United States, supra,* holds that a trial judge has the duty to see "that the trial is conducted with solicitude for the essential rights of the accused" which include the right "of an accused to have the assistance of counsel."

The District of Columbia Circuit and the Ninth Circuit require that the trial judge makes an affirmative determination that the defendants have intelligently chosen to be represented by the same attorney and that their decision was not governed by poverty and lack of information.

*Campbell v. U. S.,* 332 F. 359, 360 (1965); *Kapian v. U. S.,* 375 F. 2d 895 (9th Cir.), cert. denied, 389 U.S. 839 (1967). The California and Florida Supreme Courts have imposed on the trial judge the requirement to advise the defendants of their rights to separate counsel. *People v. Chacon,* 69 Cal. 2d 765, 447 P. 2d 106, 73 Cal. Rptr. 10 (1968).

*State v. Youngblood,* 217 So. 2d 98 (Fla. 1968). *Wall v. State,* 214 So. 2d 384, required a Miranda-like warning about the possibility of inconsistent defenses evidences or trial tactics which might prejudice a defendant jointly represented. Illinois also required the trial judge to inform the defendants of a possible conflict of interest. *People v. Von Hyning,* 72 Ill. App. 2d 168, 219 N.E. 2d 268 (1966).

The Second Circuit, however, conflicts with the District of Columbia and Ninth Circuits in its decision in *U. S. v. Paz Sierra,* 367 F. 2d 932 (2nd Cir., 1966). This case was cited and relied upon by the Government in its brief to the Court of Appeals.

This Court should resolve the conflict between the circuits on this important question and hold that a trial Judge has an affirmative to inquire into a possible conflict of interest where a defendant is represented by an attorney who has past representations of a co-defendant in the same matter who is jointly

tried or present representations of a co-defendant who is subject to trial.

4. Important questions are raised as to the proper interpretation of Title 28 U.S.C. 2255 in a Trial Court's granting or denying a hearing and making findings in opposition to a petition outside of the record.

Section 2255 of Title 28 provides:

"§ 2255. Federal custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

*Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief,* the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside

and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." (Emphasis added.)

Petitioner's averments in his motion were uncontroverted by the Government. Petitioner's attorney also represented three co-defendants in the same matter but not as their trial counsel. The Court went outside the record and made a finding that there was no dual representation without a hearing.

The Trial Court denied Petitioner's Fifth and Sixth Amendment rights by failing to inquire at the trial but covered its failure by going outside the trial record without granting Petitioner a hearing.

By doing so, the Court must have made certain assumptions. The basis for the assumptions are outside of the record and are fallacious.

The District Court made three basic assumptions, all of which were false, in denying the petition.

First, the District Court assumed that an attorney representing only one defendant at a trial is not hindered during that trial by a past representation of a co-defendant being tried or by a present representation of a co-defendant who is not on trial. This assumption is false and does not recognize that an attorney's obligation to a client extends beyond the termination of his employment. Canon 4-6 states:

> "The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment."

Canon 4-5 states:

> "A lawyer should not use information acquired in the course of representation of a client to the disadvantages of the client. . . ."

Second, the Court assumed that where a defendant has been represented by two attorneys that one attorney alone cannot cause a denial of a fair trial or a denial of other constitutional rights. This too is a false assumption. Fahringer's duty to represent his client zealously as provided in Canon 7 is not diminished by the fact that Fahringer had co-counsel. Petitioner's claim that Fehringer's divided loyalties hindered his effective representation can only be diminished had Fahringer or the Government claimed the co-counsel was primarily or partially responsible for the conduct of the trial. Neither the record showed nor did the Government suggest that Fahringer was not primarily and fully responsible for conducting the trial. The Government did not allege that either Fahringer or co-counsel submitted any decisions to the petitioner. Every

counsel can be presumed by a defendant to be free of conflicting interests of his attorney which would interfere with his independence of professional judgment. Canon 5-14 states:

> "Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

Canon 5-15 states:

> "If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially. On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the

> lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become differing, withdrawal is likely to have a disruptive effect upon the causes of his clients.

Third, the Court assumed that a convicted defendant who is denied the right to testify and deny his guilt and denied the right to call exculpatory witnesses to refute a Government witness's testimony is not prejudiced.

This Court in the case of *Dukes v. Warden*, Docket No. 715172 heard arguments on March 20, 1972 on a petition for certiorari on the issue of was larceny defendant denied right to counsel by his representation at guilty plea hearing by attorney who, with defendant's knowledge, had, in an earlier criminal proceeding, represented two girls who were his co-defendants and had during that proceeding made derogatory remarks about defendant before same judge who presided at his guilty plea hearing?

The affidavits were present for the Appeals Court to make its own independent judgment. See *Brookhart v. Janis*, 384 U.S. 1, 86 S. Ct. 1245 (1966); *U. S. ex rel. Bruno v. Harold*, 408 F. 2d 125 (2 Cir. 1969). But the Appeals Court again went outside the record in sustaining the trial Judge's denial of petitioner's motion.

It is thus clear that petitioner's allegations were not frivolous and they stated a substantial serious constitutional deprivation. It is further clear that the allegations were not denied by the Government. Since the Government did not refute the allegations of the petition this Court may and should treat the allegations as true. *United States v. Williams*, 348 F. 2d 844 (2 Cir. 1965).

Since the petition presented substantial allegations of both prejudice and of constitutional violations it is clear that the District Court erred in dismissing the petition as frivolous.

In the event the Government had denied petitioner's allegations of fact the Trial Court would be required to have granted petitioner a hearing. See *Machibroda v. U. S.*, 368 U.S. 487, 82 S. Ct. 510 (1962); *Sanders v. United States*, 373 U.S. ——, 83 S. Ct. 1068 (1962).

Since however, the Government could not refute the facts alleged in the petition this Court must base its decision on the record. Petitioner's allegations are unrebutted. The questions before this Court are questions of law. The conviction should be vacated without a hearing.

This Court has reversed a Federal Appellate Court without requiring a hearing, per curiam, without explanation which had refused a denial of speedy trial claim never raised at trial or on appeal. *Jordan v. United States*, 352 U.S. 904, 77 S. Ct. (1956), reversing 233 F. 2d 362 (1955). Also see *Rodriguez v. United States*, 395 U.S. 327, 89 S. Ct. (1969); *Williams v. Kaiser*, 323 U.S. 471, 65 S. Ct. 363 (1945).

## CONCLUSION

For these various reasons, certiorari should issue to review the judgment of the Second Circuit in this case.

Respectfully submitted,

ROBERT J. MILAVETZ
1055 Dain Tower
Minneapolis, Minnesota
*Counsel for Petitioner*

May 12, 1972

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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FERRIS JACOB ALEXANDER,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

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NOTICE OF MOTION PURSUANT TO 28 UNITED STATES CODE, SECTION 2255

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of JAMES M. LA ROSSA, duly sworn to on the 19th day of January, 1972, the undersigned will move this Court before the Honorable Lloyd F. MacMahon, United States District Judge, United States District Court for the Southern District of New York at the United States Courthouse, Foley Square, New York, New York, at a time and place designated by the Court, for an order pursuant to Title 28, United States Code, Section 2255, vacating the conviction entered against the plaintiff in the proceeding entitled *United States of America v. Samuel R. Manarite, et al,* 69 C.R. 747.

Dated: New York, New York January 19, 1972.

Yours, etc.

JAMES M. LA ROSSA
Attorney for Plaintiff
115 Broadway
New York, N. Y. 10006
ROBERT J. MILAVITZ, ESQ.
1255 Dain Tower
Minneapolis, Minnesota
Of Counsel

To:
HON. WHITNEY NORTH SEYMOUR, JR.
United States Attorney
Southern District of New York
United States Courthouse
Foley Square
New York, New York

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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FERRIS JACOB ALEXANDER,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

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## AFFIDAVIT

State of New York
County of New York—ss.

JAMES M. LA ROSSA, being duly sworn, deposes and says:

1. That he is an attorney duly licensed to practice law in the State of New York, with offices at 115 Broadway, New York, New York.

2. That this affidavit is made upon information and belief, except as to those matters wherein it is stated that your deponent has actual knowledge thereof.

3. That he represents Ferris Jacob Alexander, the Petitioner in the above captioned action.

4. The Petitioner is presently incarcerated at the Federal Correctional Facility at Sandstone, Minnesota. Petitioner surrendered to Federal custody on January 4, 1972 to serve a prison term of eighteen months imposed by this Court upon a judgment of conviction of violating the Federal Obscenity Laws, i.e. Title 18, United States Code, Section 1465, and conspiracy in violation of Title 18, United States Code, Section 371.

5. That this Affidavit is made in support of Petitioner's motion to vacate his judgment of conviction, docketed as 69 C.R. 747, pursuant to Title 28, United States Code, Section 2255. Petitioner respectfully submits that the conviction and sentence pursuant to which Petitioner is being detained was imposed in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, the right to confront witnesses provision of the Sixth Amendment to the Constitution of the United States, and the right to the assistance of counsel under the Sixth Amendment.

6. The facts showing these Constitutional violations are as follows:

On October 27, 1969, Petitioner was indicted along with fifteen other named defendants, including his brother, Edward Jacob Alexander, on charges of violating the Federal Obscenity Laws and conspiracy to violate the same. Shortly after his arraignment on this Indictment, the Petitioner, with his brother, retained Herald Price Fahringer of Buffalo, New York, to represent them in this criminal litigation. Fahringer, prior to trial, represented two other co-defendants, Paul Wolf and Max Bornstein. Wolf failed to appear at the time the matter was called for trial and remains a fugitive. Bornstein

secured the representation of another attorney who ultimately gained an acquittal for his client.

Petitoner, prior to trial, conferred with Mr. Fahringer and revealed the extent of his participation in the alleged scheme. At that meeting, Petitioner's brother, Edward Jacob Alexander, similarly disclosed what his position was with respect to the acts alleged. At the time of these initial meetings Petitioner was unaware of the legal implications of the fact that the positions taken by he and his brother were inconsistent and unsimilar. Mr. Fahringer apparently failed at that time to bare the fact that a conflict of interest existed between Petitioner and his brother. Further, it was made known to Mr. Fahringer at these meetings that the testimony of the Petitioner and his brother would strongly tend to implicate co-defendants Wolf and Bornstein. Petitioner was not advised, and at that time did not understand, that counsel had a subconscious loyalty and sense of responsibility toward Wolf and Bornstein, although no longer formally representing them.

At the trial of the action herein, one Bruce Valentine, named as a co-conspirator but not a defendant, gave testimony which implicated the Petitioner in the alleged scheme to transport obscene materials. It should be noted that Bruce Valentine was the sole witness to implicate the Petitioner. The Petitioner's involvement in the conspiracy and two substantive acts on which he was convicted, was based upon Valentine's testimony of meetings with Petitiorer in New York City and deliveries to him in Minneapolis, Minnesota. Valentine's Grand Jury testimony evidenced the fact that he was somewhat confused when distinguishing the activity of the two brothers. However, his testimony remains that when in Minnesota he met with the Petitioner in the course of delivering these printed materials. It is the Petitioner's position, as it has consistently

been since Valentine testified, that it was not he that Valentine met on his trips to Minnesota. The thin thread that linked the Petitioner to the conspiracy could easily have been broken if Petitioner had demonstrated that he was never present at a meeting in New York City and that it was not he with whom the witness met.

Petitioner bases his claim of deprivation of counsel on the fact that Mr. Fahringer's loyalty was divided. It should be noted that the Petitioner does not allege that Mr. Fahringer in any way violated his professional oath. However, the fact that he represented four of the co-defendants through at least the motion stages of the proceedings, rendered him incapable of devoting his full efforts to the Petitioner. Edward Jacob Alexander's willingness to waive his Fifth Amendment privilege and testify on behalf of Petitioner in an attempt to reveal the truth, and Petitioner's repeated demands to testify in his own behalf, indicates, it is submitted, that Mr. Fahringer was at least subconsciously concerned with more than the position of the Petitioner.

Petitioner asserts that counsel's rejection of every effort to have he and his brother testify went well beyond the scope of trial strategy. Petitioner, who has never been previously convicted of a crime, was not told by Mr. Fahringer that it was the Petitioner's determination as to whether he would testify. The conflict of interest between Petitioner and his brother is now clear. This conflict is further compounded by the conflict of interest with Bornstein and Wolf. Although the latter is not apparent on the face of the record, Petitioner alleges that a hearing on this Petition would clearly reveal this divided loyalty.

WHEREFORE, it is respectfully requested that in view of the foreoing facts, Petitioner's Judgment of Conviction

should be vacated or in the alternative, a hearing be held pursuant to Title 28, United States Code, Section 2255.

JAMES M. LA ROSSA

Sworn to before me this 19th day of January, 1972.—Lenore Berg, Commissioner of Deeds, City of New York No. 2-1352. Certificate filed in New York County. Commission expires Aug. 2, 19—.

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(Title of Cause)

AFFIDAVIT IN OPPOSITION

Joel M. Friedman, being duly sworn, deposes and says that:

1. I am a Special Attorney with the United States Department of Justice, Criminal Division, Organized Crime and Racketeering Section, Joint Strike Force for the Southern District of New York, and as the attorney assigned to this case am fully familiar with all the facts pertaining thereto.

2. This affidavit is submitted in opposition to the motion of defendant Ferris Jacob Alexander pursuant to 28 U.S.C. 2255, sworn to on January 19, 1972.

3. On October 27, 1969, Indictment No. 69 Cr. 747 was returned in the Southern District of New York.

4. Shortly after the filing of the indictment, Mr. Harold Price Fahringer filed an appearance for Max Bornstein and Paul Wolf. Copy attached as Exhibit A and incorporated herein.

5. On or about January 7, 1970, Keith D. Kennedy, filed an appearance for Edward J. Alexander and Ferris J. Alexander. Copy attached as Exhibit B and incorporated herein.

6. On March 12, 1970 the following colloquy occurred be-

tween Mr. Fahringer and the Court. Copy attached as Exhibit C and incorporated herein.

7. On or about October 1, 1970, Melvin N. Fine filed an appearance for Max Bornstein. Copy attached as Exhibit D and incorporated herein.

8. On September 20, 1970, Herald Price Fahringer sent a letter to Judge MacMahon. Copy attached as Exhibit E and incorporated herein.

9. On September 26, 1970, Herald Price Fahringer sent a letter to Judge MacMahon. Copy attached as Exhibit F and incorporated herein.

10. Nowhere in the record is there an indication that Mr. Kennedy had withdrawn from the case.

11. On October 5, 1970, the Government severed its case against Edward Jacob Alexander and went to trial against Ferris Jacob Alexander and seven other defendants. Max Bornstein was present at trial and represented by Max Fine, Paul Wolf failed to appear for trial and was later indicted for bail jumping.

12. On October 5, 1970, Mr. Fahringer made the following statement. Copy of transcript attached and incorporated herein as Exhibit G. Mr. Milavitz and Mr. Fahringer represented Mr. Alexander at trial.

13. Apparently from on or about October 5, 1970 until the present Mr. Robert J. Milavitz represented Ferris Jacob Alexander. Mr. Fahringer also represented Ferris Jacob Alexander at trial and continued to represent him until January 6, 1972.

14. On or about December 22, 1969, James La Rossa filed an appearance for Richard Portella and Carol Portella. Mr. La Rossa or attorneys in his firm represented Mr. Portella as late as Mr. Portella's surrender on January 6, 1972.

15. Ferris Jacob Alexander's motion is frivolous on its face and should be dismissed without hearing.

16. I spoke to Mr. Fahringer on January 27, 1972 by telephone and he informed me that at about the time that he wrote the letters (Exhibit E and F of this affidavit) it had become likely that he would defend one of the Alexanders and therefore he called them into his office at Buffalo and instructed them that he definitely would defend one and only one of them at trial if they both went to trial.

17. The submission of this motion on the part of Mr. La Rossa insults the intelligence of this court. Apparently Mr. La Rossa would seek to overturn Mr. Alexander's conviction on the basis of an alleged conflict of interest which if it existed would also exist to the same degree in Mr. La Rossa's present representation of Mr. Alexander. If there were any merit to this motion it would seem appropriate for Mr. La Rossa to withdraw rather than cause the court to expend further resources on another 2255 based upon Mr. La Rossa's alleged conflict of interest, due to his present joint representation of Mr. Portella and Mr. Alexander.

18. Despite defendant Alexander's allegations to the contrary, there was substantial documentary evidence, and testimony by Mr. Del Rosso and Agent Anderson in addition to the testimony of Mr. Valentine, that implicated him at trial.

Wherefore, it is respectfully requested that in view of the foregoing facts Petitioner's motion be dismissed as frivolous, without a hearing.

JOEL M. FRIEDMAN
Special Attorney
Joint Strike Force

Subscribed and sworn to before me this —— day of ——, 1972.

JMF:pas

USA-33s-187
Rev. 2/4/66

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

UNITED STATES OF AMERICA
vs.
SAMUEL P. MAHARITZ et al.

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To: John J. Olear, Jr., Clerk, United States District Court, Southern District of New York
Sir:

You are hereby notified that I appear for Paul Wolf and Max Bornstein, the defendants in the above-entitled action.

Dated: New York,

HAROLD PRICE FAHRINGER
Attorney for Defendant

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(Title of Cause)

To: John Livingston, Clerk, United States District Court, Southern District of New York
Sir:

You are hereby notified that I appear for Edward Alexander and Ferris Alexander, the defendants in the above-entitled action.

Dated: New York, New York.

KEITH D. KENNEDY
Attorney for Defendant
1115 Plymouth Building
Minneapolis, Minnesota

The Court: I will reserve decision on the rest of your demands.

Mr. Wallach: Just one more motion and I will be brief.

Under Rule 16(b) my motion is academic. The government consented to let us examine the materials involved.

The Court: You consent to that, do you?

Mr. Blommer: I consent to everything that the defendant Cacace has asked for, Your Honor.

The Court: Then the motion is granted on consent as to you.

Mr. Wallach: Thank you, Your Honor.

Mr. Fehringer: If it please Your Honor, I represent Paul Wolf, Max Bornstein and Edward and Ferris Alexander, and I want to advise the Court that the Alexander brothers are from Minneapolis and I was acting here as local counsel for their attorney in Minneapolis, who was admitted to the hospital a couple of weeks ago, and he asked me if I would be kind enough to file motions on their behalf.

I anticipate that Mr. Keith Kennedy, of Minneapolis, will be available to try this case at the time.

As to Max Bornstein, Your Honor, I am arguing the motion on his behalf, but I have indicated to him—and I will make these arrangements—that he will have to have counsel in advance of trial to handle the case for him, because of a possible conflict of interest.

If that is permissible, Your Honor, I will proceed on that basis.

The Court: All right.

Mr. Fehringer: If Your Honor please, I am going to conserve your time because I know you have heard a great deal today from the lawyers, and much of what I have to discuss with the Court has already been resolved.

May I just simply make this statement to the Court on the subject of statements because I would like there not to be any confusion about this.

I feel that we are entitled to know, when a statement was made by a defendant, whether or not the government intends to use it because if it was illegally obtained there is a possibility of course that there were leads obtained from this statement which, it seems to me, we have a right then to investigate under the doctrine of the fruit of the forbidden tree.

So that my request here is manifestly fair. I feel that I am entitled to know about and see statements of all of the defendants that may have been made, either

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(Title of Cause)

To: John Livingston, Clerk, United States District Court, Southern District of New York.

Sir:

You are hereby notified that I appear for Max Bornstein, the defendant in the above entitled action.

Dated: New York, New York.

MELVIN N. FINE
Attorney for Defendant
24 Church Street
Paterson, N. J. 07505
(201) MU4-1138

September 20, 1970

Hon. Lloyd MacMahon
United States District Court
for the Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: *United States v. Manrite, et al.*

Dear Judge MacMahon,

I regret informing you that for the past month I have been trying to contact Paul Wolf, whom I originally appeared for in the above-entitled prosecution. I also temporarily appeared for Max Bornsten while he was seeking other counsel. I had always advised him that he would have to have counsel of his own; however, I felt an obligation to make sure he had secured independent counsel. I have not been able to contact either of these men. They no longer live at the addresses that I had for them, their telephones have been disconnected, and they have left no forwarding addresses. I am now fearful that they will not appear on August 5th, and I felt that I should immediately inform you of this.

I would be most happy to sit down and discuss this matter with you, if you felt that it would be helpful in any way.

Yours vey truly,
LIPSITZ, GREEN,
FAHRINGER, ROLL,
SCHULLER & JAMES
By Herald Price Fahringer

September 26, 1970

Hon. Lloyd MacMahon
United States District Court for
the Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: *United States v. Manarite, et al. Max Bornstein.*

Dear Judge MacMahon,

I was finally able to reach Max Bornstein and reminded him that he would have to have counsel of his own on October 5th when the above-entitled matter goes to trial. He acknowledged to me that he remembered that my appearance for him was only temporary and that he had been told that he would have to have counsel of his own at the time of October 5th. He plans to obtain counsel and be ready to go to trial on October 5th.

I have still not been able to locate Paul Wolf and have not heard from him, and I am afraid that he may not appear on October 5th.

In the meantime, Edward and Ferris Alexander have asked me to represent them and I plan to proceed to trial on October 5th as attorney for the Alexanders.

Respectfully yours,
HERALD PRICE FAHRINGER

Mr. Scott: We have prepared 8 copies. I believe that should be sufficient.

The Court: I think so. I think that is ample.

Mr. Wall: I don't have anything more.

Mr. Fahringer: Your Honor, may I bother you again? I have with me Mr. Melavitz from Minneapolis. He would like to appear with me as co-counsel. He represents Mr. Alexander out in Minneapolis.

I would like to move his admission for the purposes of this case. He is a member of the bar of the District Court of Minnesota, and the 8th Circuit Court of Appeals, together with, of course, the State Bar of Minnesota.

The Court: Motion granted.

Mr. Fahringer: May I just bring up one other matter that I would like to alert the Court to. We have in these supplemental bill of particulars which have been supplied to us that certain of the defendants have cooperated with the government and will be cooperating with the government.

Under the well-known Hoffa case and the Lewis case, the United States Supreme Court spoke about government informants and approved. But there is language in these cases that I feel an obligation to bring to the Court's attention in terms of protecting our record here.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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FERRIS JACOB ALEXANDER,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

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AFFIDAVIT IN SUPPORT OF MOTION
PURSUANT TO 28 USC SEC. 2255
72 Civ. 248

ROBERT J. MILAVETZ, being first duly sworn, deposes and says that:

1. I am an attorney and have assisted Harold Fahringer in the representation of Ferris J. Alexander throughout the trial of the above entitled matter.

2. I have conferred with Mr. Harold Fahringer, Ferris Alexander and Edward Alexander and I am familiar with facts pertaining thereto.

3. That this affidavit is submitted in support of the motion of defendant, Ferris J. Alexander, pursuant to 28 USC Section 2255 sworn to on January 19, 1972.

4. That Harold Price Fahringer has in fact represented Paul Wolf, Max Bournstein, Ferris Jacob Alexander and Edward Jacob Alexander. Exhibit A attached hereto and incorporated herein by reference.

5. That perhaps originally Harold Fahringer only intended to represent either Paul Wolf or Max Bournstein but when it appeared that Paul Wolf would not appear at the trial and that Max Bournstein had little in the way of funds, Harold Fahr-

inger agreed that he would represent Ferris and Edward Alexander.

6. That testimony would show that Harold Fahringer received retainers from both Ferris J. Alexander and Edward J. Alexander.

7. That at the commencement of the trial, Harold Fahringer continued to represent Edward J. Alexander and after the court granted the motion to sever Edward J. Alexander, Harold Fahringer stated on behalf of Edward Jacob Alexander, "May he also leave the courtroom and be continued on bail?" See Exhibit B attached herewith and incorporated herein by reference.

8. That Mr. Fahringer was not relieved from his duty to represent Max Bournstein until the time of the trial. See Exhibit C attached herewith and incorporated herein by reference.

9. That Mr. Fahringer has continued to represent Edward Alexander at least until the beginning of the year, 1972 when he filed a motion to dismiss the indictment against Edward Jacob Alexander herein. Copy Exhibit D attached herewith and incorporated herein by reference.

10. That although Harold Fahringer stated that he would only represent one of the Alexanders at the time of the trial he also represented that he would be in charge of both of their defenses.

11. The Government should not attempt to confuse the Court with the allegation that, "There is nowhere in the record an indication that Mr. Kennedy withdrew from the case." Mr. Kennedy never appeared at the trial. The fact that Mr. Kennedy represented either Ferris or Edward Alexander in the past is not relevant. Neither is it relevant that other counsel may have had conflicts of interest. It is apparent, however,

that the Government does not understand petitioner's allegations. Petitioner does not allege that there is necessarily a conflict of interest. On the other hand, simply because an attorney is only appearing with one defendant during a trial does not mean that there is no conflict of interest.

12. Petitioner alleges that there was a conflict of interest in this case because of two facts. A) Harold Fahringer had a dual loyalty to Ferris Alexander and his other clients, Paul Wolf, Max Bournstein and Edward Alexander. B) The dual loyalty interfered with Fahringer's ability to make decisions.

13. Fahringer had to consider whether or not to allow Edward Alexander to testify for his brother Ferris Alexander as Ferris had requested of him. Fahringer had to consider the extent of his cross-examination of the Government witnesses such as Bruce Valentine who alleged that he met Ferris Alexander in New York and in Minneapolis, Minnesota and the lady from the bank in Minneapolis who alleged that she had sold money orders to Ferris Alexander.

14. Harold Fahringer had to consider whether or not to confront these witnesses with Edward Alexander and what effect this would not only have on Ferris's case but what effect this would have on the possibility of Edward Alexander being tried. During the course of the trial, a mistrial was declared and again Harold Fahringer had to consider whether or not Paul Wolf might return and be tried in a new trial or go ahead on the same possibly contaminated jury. Fahringer waived without first conferring with petitioner. Fahringer had to consider whether or not Ferris Alexander should testify knowing that Ferris Alexander would have to testify that he did know Paul Wolf and Max Bournstein. He had to consider what effect this would have on their cases.

15. Petitioner alleges that these are questions not of trial strategy. Petitioner alleges that Fahringer could not make these decisions and other decisions objectively because he was fettered by his duties to his other clients.

16. The fact that Fahringer disclosed to the court that he may have a conflict of interest in representing Paul Wolf and Max Bournstein is of no moment to Petitioner's case. Perhaps even it should have pointed the need for the Court to make inquiry directly with Ferris Alexander. When it became apparent during the course of the trial that Fahringer would have to make certain decisions as to the extent of his cross-examination of Government witnesses, as to whether or not witnesses should be called and as to whether or not Ferris Alexander should testify, Fahrlinger should have disclosed his conflict to the Court. The Court could have then appointed another attorney to confer with Ferris Alexander and another attorney perhaps to confer with Edward Alexander.

17. Fahringer's conflict shackled him to such an extent that he could not even inquire of Edward Alexander as to what his testimony would be if he were called to testify on behalf of Ferris Alexander. Fahringer did advise Edward Alexander, however, not to testify and not to be available for a subpoena.

18. Regardless of the amount of documentary evidence alleged by the Government to be against petitioner, petitioner's Sixth Amendment right to adequate, effective assistance of counsel is not diminished. Defendant Ferris Alexander was entitled to counsel who was unhindered with any duty to protect any other persons. The greater the evidence against petitioner, the more compelling was petitioner's need for effective assistance of counsel.

FURTHER YOUR AFFIANT SAYETH NOT, save he makes this affidavit in support of a motion for a hearing pursuant to 28 USC Section 2255.

ROBERT J. MILAVETZ

Subscribed and sworn to before me this ..... day of February, 1972. — ....., Notary Public.

---

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

UNITED STATES OF AMERICA

vs.

SAMUEL S MANARITE, et al.,
PAUL WOLF, MAX BORNSTEIN,
FERRIS JACOB ALEXANDER and
EDWARD JACOB ALEXANDER,
*Defendants*

---

NOTICE OF MOTION

Indctment No.
69 Cr. 747

Sir:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Herald Price Fahringer duly sworn to on the 28th day of February, 1970, and upon the indictment and all the other proceedings heretofore had herein, the undersigned will move this Court on behalf of the defendants, Paul Wolf, Max Bornstein, Ferris Jacob Alexander and Edward Jacob Alexander, at a Criminal Term for Motions to be held in the Federal Court-

house located at Foley Square, Borough of Manhattan, State of New York, for the following relief:

1) For an order directing certain discovery and inspection pursuant to Rule 16 of the Federal Rules of Criminal Procedure;

2) For an order requiring the Government to produce and deliver to the defendants all evidence favorable to them under the authority of *Brady v. Maryland*, 373 U.S. 83.

3) For an order suppressing any statements made by the defendants or in the alternative a hearing be conducted to determine the constitutional propriety of such statements pursuant to *Miranda v. Arizona*, 384 U.S. 436, and other related cases.

4) For an order suppressing certain evidence unlawfully seized from the defendants or in the alternative an order directing a hearing be conducted to determine all relevant issues connected with defendants' claims that certain evidence was seized from them unlawfully, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure;

5) For an order dismissing the indictment pursuant to Rule 12 of the Federal Rules of Criminal Procedure;

6) For an order dismissing the indictment on the grounds that Section 1465 of Title 18 is unconstitutional, and an order so declaring that section to be unconstitutional, and further dismissing the indictment on the grounds that the Court has no jurisdiction to try such an indictment pursuant to Rule 12 of the Federal Rules of Criminal Procedure;

7) For an order granting inspection of the Grand Jury Minutes pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure;

8) For an order granting a Bill of Particulars pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure;

9) For an order granting a severance and separate trials for these defendants under Rule 14 of the Federal Rules of Criminal Procedure;

10) That this Court grant such other and further relief as is just under all of the circumstances of this case.

Dated: Buffalo, New York, February 28th, 1970.

Yours, etc.,
HERALD PRICE FAHRINGER
Attorneys for Defendants,
Paul Wolf, Max Bornstein,
Ferris Jacob Alexander and
Edward Jacob Alexander
Office & P.O. Address
One Niagara Square
Buffalo, New York 14202

To: STEPHEN SCOTT
Asst. United States Attorney
Department of Justice
Federal Plaza
New York, New York

---

PATRICK M. WALL, ESQ.,
Attorney for Defendant Luis Marti.
JAMES M. LA ROSSA, ESQ.,
Attorney for Defendants Richard J. Portola
and Carol Ann Portola.
MICHAEL P. DIRENZO, ESQ.,
Attorney for Defendant Dominick Constantine.
VICTOR A. ROBERTS, ESQ.,
Attorney for Defendant Phil Primet.

HOWARD L. JACOBS, ESQ.,
Attorney for Defendant Frank J. Del Rosso, Jr.
MILTON ADLER, ESQ.,
Attorney for Defendant Salvatore Puntasecca.
By: John P. Curley, Jr., Esq., of Counsel.
MELVIN M. FINE, ESQ., and
KALMAN, HARRIS & CEIST, ESQS.,
Attorneys for Defendant Max Bornstein.
ARNOLD E. WALLACH, ESQ.
Attorney for Defendant Vinny Cacace.
HERALD PRICE FAHRINGER, ESQ., and
ROBERT MILAVETZ, ESQ.
Attorneys for Defendants Ferris Jacob Alexander and Edward Jacob Alexander.
Also Present:
Abraham H. Brodsky, Esq.

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One could argue that the Court was referring strictly to a written statement, but this is not what the Court said in its opinion. Mr. Kelly apparently is charged as a co-conspirator and is cooperating with the government and the government has indicated they intended to name him. With that in mind and the fact that in the short time I have had available, it appears to me that numerous of the co-defendants may have, and, in fact, from the discovery ordered by the Court, given by the government, numerous acts of co-defendants which could prejudice Mr. Bornstein in the eyes of the jury, and if he were to be tried with these co-defendants and have the co-defendant Kelly testify against him and others, his case could and very probably would be tainted by the balance of the tes-

timony, and I think it would be a miscarriage of justice as to Mr. Bornstein to force me on at this time and not to sever his case. I would like a ruling on this motion. I have other motions.

Mr. Scott: I have a notice of appearance by Mr. Fine just recently. However, I have in my files a notice of appearance for Mr. Bornstein filed by Mr. Fahringer. There is no date on it, but it was way back at the time this case was initiated, at the time of the arraignment. Mr. Fine simply filed his just a week or so ago, and the government opposes any motion for severance for that reason. If he was going to be the attorney of record he could have filed a notice of appearance months earlier. Mr. Fahringer, as far as we were concerned, was the attorney of record for Mr. Bornstein.

The Court: My recollection is Mr. Fahringer wrote the Court a letter asking to be relieved and I denied it on the ground that it came too late.

Mr. Scott: I did not receive a copy of the letter. I have a notice of appearance filed by Mr. Fahringer and have no withdrawal from him.

The Court: I will deny the motion.

What about the motion to sever?

Mr. Scott: The reasons given at that time were the Bruton problems. The government opposes the motion to sever on the ground there would be no Bruton problem here. If any statements of co-conspirators are used against the defendant Bornstein, no Bruton problem will exist.

The Court: I deny that motion at this time, again without prejudice to renew when, as and if the problem arises.

Does the government have any motions?

Mr. Scott: The government has no motions to make. It is my understanding the defendant Paul Wolf is not in court today. I would like to verify that?

Mr. Fahringer: I also wrote you a letter—I think it was two to three weeks ago—where I had advised that we had been unable to reach Mr. Wolf and I advised the Court today that he is not in court and I do not know where he is.

Mr. Scott: In view of that the government moves at this time for forfeiture of Mr. Wolf's bail and makes application for a bench warrant.

The Court: Motion granted.

Mr. Scott: The government moves for a severance of Mr. Wolf in this case.

The Court: Motion granted.

Mr. Scott: The government moves for a severance of the defendants Phil Primet, Frank J. Del Rosso, Jr., James Kelly, Edward Jacob Alexander, and Vinny Caccace.

Mr. Wallach: I don't mean to be rude, but I represent Caccace, I am his attorney. It comes as a surprise to me. I understand the government wishes to sever as to Caccace?

The Court: Yes, that is what the motion is.

Mr. Wallach: I made such a motion before. I certainly can't oppose that on behalf of Caccace.

The Court: Motion granted.

Mr. Scott: As to the other defendants, your Honor?

The Court: As to all you mentioned.

Mr. Wallach: May Mr. Caccace then leave the courtroom, and may his parole be continued?

The Court: Yes.

Mr. Fahringer: On behalf of Edward Jacob Alexander, may he also leave the courtroom and be continued on his bail?

The Court: Yes.

Mr. Wallach: I submitted a request under Rule 2423 as to the jury. I no longer have need of that, but I showed it to co-counsel, and I assume that any application made by one defendant will inure to all. So I leave that with your Honor and counsel.

The Court: Do you have any other application?

Mr. Scott: The government respectfully requests that Mr. James McShane of the Federal Bureau of Investigation be permitted to sit at counsel table during the course of this trial. This is a very complicated conspiracy with numerous defendants. Mr. McShane is the agent in charge of the investigation. He will be testifying, your Honor. However, we do not believe that there will be any prejudice to the defendants by his being at counsel table and I respectfully request that.

The Court: Can you give us some indication without prejudicing your case what the nature of his testimony will be?

---

Feb. 14, 1972

"The files and records of this Court show beyond preadventure that Harald Price Fahringer, Esq., did not represent Ferris Jacob Alexander in any real sense upon the trial until he had ceased to represent other defendants. Additionally, Robert J. Milavetz, Esq., represented Ferris Jacob Alexander throughout the trial. The record is plain that on the trial proper Mr. Fahringer represented only Ferris Jacob Alexander. The supporting affidavit of James M. LaRossa, Esq., who has since withdrawn from this application because "the manner in which Mr. Alexander seeks to secure habeas corpus relief is wholly incompatible with my own standands of professional responsibility," and the affidavit of Mr. Milavetz, wholly fails to show any facts pointing to any specific instance of prejudice or real conflict of interest. In short, this application is frivolous and is therefore denied without a hearing. 28 USC 2255. *United States v. Lovano*, 420 F. 2d 769 (2 Cir.), cert. denied, 397 U.S.

1071 (1970). *Hussey v. LaVallee*, 428 F. 2d 457 (2 Cir. 1970), cert. denied, 460 U.S. 995 (1971).

So Ordered.

LLOYD F. MacMAHON
U. S. D. J.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of April, one thousand nine hundred and seventy-two.

Present: Hon. Henry J. Friendly, Chief Judge; Hon. J. Joseph Smith, Hon. James L. Oakes, Circuit Judges.

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FERRIS JACOB ALEXANDER,
*Petitioner-Appellant,*

v.

UNITED STATES OF AMERICA,
*Respondent-Appellee.*

---

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO, Clerk

(A true copy — A. Daniel Fusaro, Clerk.)

# In the Supreme Court of the United States

OCTOBER TERM, 1971

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No. 71-1480

FERRIS JACOB ALEXANDER, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts charging him with transporting obscene material in interstate commerce for the purpose of sale and distribution, in violation of 18 U.S.C. 1465, and on one count charging him with conspiring to do so, in violation of 18 U.S.C. 371. He was sentenced to three concurrent terms of imprisonment of eighteen months and fined $20,000.

The Court of Appeals for the Second Circuit affirmed the conviction on July 7, 1971 (*United States* v. *Manarite, et al.*, 448 F.2d 583), and, on November 9, 1971, this Court denied a petitioned for a writ of certiorari (404 U.S. 947).

Following incarceration on January 4, 1972, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence on the ground that one of his two retained trial attorneys had a conflict of interest. On February 14, 1972, the trial judge denied the motion without a hearing on the ground that the claim was refuted by the files and records of this case (App. 25-26).[1] On April 14, 1972, the court of appeals affirmed without an opinion (App. 26).

Petitioner's basic contention is that he was denied the effective representation of counsel because prior to trial one of his attorneys had represented co-defendants.

At trial petitioner was represented by two retained attorneys, Robert J. Milavetz, petitioner's attorney throughout these proceedings, and Harold Price Fahringer. Initially, Mr. Fahringer filed an appearance for co-defendants Bornstein and Wolf. In the pre-trial proceedings, Mr. Fahringer also filed motions for petitioner and his brother, but acting only as local counsel (App. 10). At that time, Mr. Fahringer also told the trial court that he was representing Bornstein only on the motions and had advised him to secure separate trial counsel (*ibid.*), which

[1] "App." refers to the Appendix which petitioner has filed in this Court.

Mr. Bornstein did (App. 11). Subsequently, on September 26, 1970, Mr. Fahringer wrote the trial judge reminding him that he no longer represented Bornstein, and stating that he was unable to locate Wolf, that he was afraid Wolf might not appear for trial, that petitioner and his brother had asked him to represent them and that he planned to represent them at trial (App. 13).

On the day the trial commenced, October 5, 1970, the case of petitioner's brother, Edward Alexander, was severed (App. 24).[2] Mr. Fahringer and Mr. Milavetz appeared as co-counsel for petitioner (App. 14, 22). A different attorney represented defendant Bornstein (App. 22). Paul Wolf failed to appear (App. 23-24). As the district court ruled (Pet. 11), the files and records demonstrate that Mr. Fahringer did not represent petitioner in any real sense until he had ceased to represent other defendants.

The claim of divided loyalty to defendants who were not on trial is an afterthought. None of the facts of Mr. Fahringer's past representation was in any way hidden. Moreover, petitioner was represented at trial not only by Mr. Fahringer but also by Mr. Milavetz, who represented him on appeal and in these proceedings, both counsel of his own choosing. Mr. Milavetz is not alleged to have represented any other party prior to or at trial. Petitioner thus always had the services of an attorney with no possible conflict of inter-

[2] The indictment against Edward Alexander was subsequently dismissed.

est—one who could have acted to protect petitioner's interests had he felt that Mr. Fahringer's representation was deficient.

Petitioner also contends that the prosecutor acted wrongfully in having the case of petitioner's brother severed, arguing that this concealed the inability of a crucial witness to distinguish petitioner from his brother. There is nothing in the record to support a claim of improper prosecutorial motive and no deception was involved, since the grand jury testimony in which Bruce Valentine, the principal witness, had difficulty making a positive identification between the two brothers was turned over to petitioner's counsel and used by Mr. Fahringer in cross-examination.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

JUNE 1972.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 488868 823

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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FERRIS JACOB ALEXANDER,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

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NOTICE OF MOTION PURSUANT TO 28 UNITED STATES CODE, SECTION 2255

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of JAMES M. LA ROSSA, duly sworn to on the 19th day of January, 1972, the undersigned will move this Court before the Honorable Lloyd F. MacMahon, United States District Judge, United States District Court for the Southern District of New York at the United States Courthouse, Foley Square, New York, New York, at a time and place designated by the Court, for an order pursuant to Title 28, United States Code, Section 2255, vacating the conviction entered against the plaintiff in the proceeding entitled *United States of America v. Samuel R. Manarite, et al*, 69 C.R. 747.

Dated: New York, New York January 19, 1972.

Yours, etc.

JAMES M. LA ROSSA
Attorney for Plaintiff
115 Broadway
New York, N. Y. 10006
ROBERT J. MILAVITZ, ESQ.
1255 Dain Tower
Minneapolis, Minnesota
Of Counsel

To:
HON. WHITNEY NORTH SEYMOUR, JR.
United States Attorney
Southern District of New York
United States Courthouse
Foley Square
New York, New York

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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FERRIS JACOB ALEXANDER,
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

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## AFFIDAVIT

State of New York
County of New York—ss.

JAMES M. LA ROSSA, being duly sworn, deposes and says:

1. That he is an attorney duly licensed to practice law in the State of New York, with offices at 115 Broadway, New York, New York.

2. That this affidavit is made upon information and belief, except as to those matters wherein it is stated that your deponent has actual knowledge thereof.

3. That he represents Ferris Jacob Alexander, the Petitioner in the above captioned action.

4. The Petitioner is presently incarcerated at the Federal Correctional Facility at Sandstone, Minnesota. Petitioner surrendered to Federal custody on January 4, 1972 to serve a prison term of eighteen months imposed by this Court upon a judgment of conviction of violating the Federal Obscenity Laws, i.e. Title 18, United States Code, Section 1465, and conspiracy in violation of Title 18, United States Code, Section 371.

5. That this Affidavit is made in support of Petitioner's motion to vacate his judgment of conviction, docketed as 69 C.R. 747, pursuant to Title 28, United States Code, Section 2255. Petitioner respectfully submits that the conviction and sentence pursuant to which Petitioner is being detained was imposed in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, the right to confront witnesses provision of the Sixth Amendment to the Constitution of the United States, and the right to the assistance of counsel under the Sixth Amendment.

6. The facts showing these Constitutional violations are as follows:

On October 27, 1969, Petitioner was indicted along with fifteen other named defendants, including his brother, Edward Jacob Alexander, on charges of violating the Federal Obscenity Laws and conspiracy to violate the same. Shortly after his arraignment on this Indictment, the Petitioner, with his brother, retained Herald Price Fahringer of Buffalo, New York, to represent them in this criminal litigation. Fahringer, prior to trial, represented two other co-defendants, Paul Wolf and Max Bornstein. Wolf failed to appear at the time the matter was called for trial and remains a fugitive. Bornstein

secured the representation of another attorney who ultimately gained an acquittal for his client.

Petitoner, prior to trial, conferred with Mr. Fahringer and revealed the extent of his participation in the alleged scheme. At that meeting, Petitioner's brother, Edward Jacob Alexander, similarly disclosed what his position was with respect to the acts alleged. At the time of these initial meetings Petitioner was unaware of the legal implications of the fact that the positions taken by he and his brother were inconsistent and unsimilar. Mr. Fahringer apparently failed at that time to bare the fact that a conflict of interest existed between Petitioner and his brother. Further, it was made known to Mr. Fahringer at these meetings that the testimony of the Petitioner and his brother would strongly tend to implicate co-defendants Wolf and Bornstein. Petitioner was not advised, and at that time did not understand, that counsel had a subconscious loyalty and sense of responsibility toward Wolf and Bornstein, although no longer formally representing them.

At the trial of the action herein, one Bruce Valentine, named as a co-conspirator but not a defendant, gave testimony which implicated the Petitioner in the alleged scheme to transport obscene materials. It should be noted that Bruce Valentine was the sole witness to implicate the Petitioner. The Petitioner's involvement in the conspiracy and two substantive acts on which he was convicted, was based upon Valentine's testimony of meetings with Petitioner in New York City and deliveries to him in Minneapolis, Minnesota. Valentine's Grand Jury testimony evidenced the fact that he was somewhat confused when distinguishing the activity of the two brothers. However, his testimony remains that when in Minnesota he met with the Petitioner in the course of delivering these printed materials. It is the Petitioner's position, as it has consistently

been since Valentine testified, that it was not he that Valentine met on his trips to Minnesota. The thin thread that linked the Petitioner to the conspiracy could easily have been broken if Petitioner had demonstrated that he was never present at a meeting in New York City and that it was not he with whom the witness met.

Petitioner bases his claim of deprivation of counsel on the fact that Mr. Fahringer's loyalty was divided. It should be noted that the Petitioner does not allege that Mr. Fahringer in any way violated his professional oath. However, the fact that he represented four of the co-defendants through at least the motion stages of the proceedings, rendered him incapable of devoting his full efforts to the Petitioner. Edward Jacob Alexander's willingness to waive his Fifth Amendment privilege and testify on behalf of Petitioner in an attempt to reveal the truth, and Petitioner's repeated demands to testify in his own behalf, indicates, it is submitted, that Mr. Fahringer was at least subconsciously concerned with more than the position of the Petitioner.

Petitioner asserts that counsel's rejection of every effort to have he and his brother testify went well beyond the scope of trial strategy. Petitioner, who has never been previously convicted of a crime, was not told by Mr. Fahringer that it was the Petitioner's determination as to whether he would testify. The conflict of interest between Petitioner and his brother is now clear. This conflict is further compounded by the conflict of interest with Bornstein and Wolf. Although the latter is not apparent on the face of the record, Petitioner alleges that a hearing on this Petition would clearly reveal this divided loyalty.

WHEREFORE, it is respectfully requested that in view of the foreoing facts, Petitioner's Judgment of Conviction

should be vacated or in the alternative a hearing be held pursuant to Title 28, United States Code, Section 2255.

JAMES M. LA ROSSA

Sworn to before me this 19th day of January, 1972.—Lenore Berg, Commissioner of Deeds, City of New York No. 2-1352. Certificate filed in New York County. Commission expires Aug. 2, 19—.

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(Title of Cause)

AFFIDAVIT IN OPPOSITION

Joel M. Friedman, being duly sworn deposes and says that:

1. I am a Special Attorney with the United States Department of Justice, Criminal Division, Organized Crime and Racketeering Section, Joint Strike Force for the Southern District of New York, and as the attorney assigned to this case am fully familiar with all the facts pertaining thereto.

2. This affidavit is submitted in opposition to the motion of defendant Ferris Jacob Alexander pursuant to 28 U.S.C. 2255, sworn to on January 19, 1972.

3. On October 27, 1969, Indictment No. 69 Cr. 747 was returned in the Southern District of New York.

4. Shortly after the filing of the indictment, Mr. Harold Price Fahringer filed an appearance for Max Bornstein and Paul Wolf. Copy attached as Exhibit A and incorporated herein.

5. On or about January 7, 1970, Keith D. Kennedy, filed an appearance for Edward J. Alexander and Ferris J. Alexander. Copy attached as Exhibit B and incorporated herein.

6. On March 12, 1970 the following colloquy occurred be-

tween Mr. Fahringer and the Court. Copy attached as Exhibit C and incorporated herein.

7. On or about October 1, 1970, Melvin N. Fine filed an appearance for Max Bornstein. Copy attached as Exhibit D and incorporated herein.

8. On September 20, 1970, Herald Price Fahringer sent a letter to Judge MacMahon. Copy attached as Exhibit E and incorporated herein.

9. On September 26, 1970, Herald Price Fahringer sent a letter to Judge MacMahon. Copy attached as Exhibit F and incorporated herein.

10. Nowhere in the record is there an indication that Mr. Kennedy had withdrawn from the case.

11. On October 5, 1970, the Government severed its case against Edward Jacob Alexander and went to trial against Ferris Jacob Alexander and seven other defendants. Max Bornstein was present at trial and represented by Max Fine, Paul Wolf failed to appear for trial and was later indicted for bail jumping.

12. On October 5, 1970, Mr. Fahringer made the following statement. Copy of transcript attached and incorporated herein as Exhibit G. Mr. Milavitz and Mr. Fahringer represented Mr. Alexander at trial.

13. Apparently from on or about October 5, 1970 until the present Mr. Robert J. Milavitz represented Ferris Jacob Alexander. Mr. Fahringer also represented Ferris Jacob Alexander at trial and continued to represent him until January 6, 1972.

14. On or about December 22, 1969, James La Rossa filed an appearance for Richard Portella and Carol Portella. Mr. La Rossa or attorneys in his firm represented Mr. Portella as late as Mr. Portella's surrender on January 6, 1972.

15. Ferris Jacob Alexander's motion is frivolous on its face and should be dismissed without hearing.

16. I spoke to Mr. Fahringer on January 27, 1972 by telephone and he informed me that at about the time that he wrote the letters (Exhibit E and F of this affidavit) it had become likely that he would defend one of the Alexanders and therefore he called them into his office at Buffalo and instructed them that he definitely would defend one and only one of them at trial if they both went to trial.

17. The submission of this motion on the part of Mr. La Rossa insults the intelligence of this court. Apparently Mr. La Rossa would seek to overturn Mr. Alexander's conviction on the basis of an alleged conflict of interest which if it existed would also exist to the same degree in Mr. La Rossa's present representation of Mr. Alexander. If there were any merit to this motion it would seem appropriate for Mr. La Rossa to withdraw rather than cause the court to expend further resources on another 2255 based upon Mr. La Rossa's alleged conflict of interest, due to his present joint representation of Mr. Portella and Mr. Alexander.

18. Despite defendant Alexander's allegations to the contrary, there was substantial documentary evidence, and testimony by Mr. Del Rosso and Agent Anderson in addition to the testimony of Mr. Valentine, that implicated him at trial.

Wherefore, it is respectfully requested that in view of the foregoing facts Petitioner's motion be dismissed as frivolous, without a hearing.

JOEL M. FRIEDMAN
Special Attorney
Joint Strike Force

Subscribed and sworn to before me this —— day of ——, 1972.

JMF:pas

USA-33s-187
Rev. 2/4/66

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA
vs.
SAMUEL P. MAHARITZ et al.

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To: John J. Olear, Jr., Clerk, United States District Court, Southern District of New York

Sir:

You are hereby notified that I appear for Paul Wolf and Max Bornstein, the defendants in the above-entitled action.

Dated: New York,

HAROLD PRICE FAHRINGER
Attorney for Defendant

---

(Title of Cause)

To: John Livingston, Clerk, United States District Court, Southern District of New York

Sir:

You are hereby notified that I appear for Edward Alexander and Ferris Alexander, the defendants in the above-entitled action.

Dated: New York, New York.

KEITH D. KENNEDY
Attorney for Defendant
1115 Plymouth Building
Minneapolis, Minnesota

The Court: I will reserve decision on the rest of your demands.

Mr. Wallach: Just one more motion and I will be brief. Under Rule 16(b) my motion is academic. The government consented to let us examine the materials involved.

The Court: You consent to that, do you?

Mr. Blommer: I consent to everything that the defendant Cacace has asked for, Your Honor.

The Court: Then the motion is granted on consent as to you.

Mr. Wallach: Thank you, Your Honor.

Mr. Fehringer: If it please Your Honor, I represent Paul Wolf, Max Bornstein and Edward and Ferris Alexander, and I want to advise the Court that the Alexander brothers are from Minneapolis and I was acting here as local counsel for their attorney in Minneapolis, who was admitted to the hospital a couple of weeks ago, and he asked me if I would be kind enough to file motions on their behalf.

I anticipate that Mr. Keith Kennedy, of Minneapolis, will be available to try this case at the time.

As to Max Bornstein, Your Honor, I am arguing the motion on his behalf, but I have indicated to him—and I will make these arrangements—that he will have to have counsel in advance of trial to handle the case for him, because of a possible conflict of interest.

If that is permissible, Your Honor, I will proceed on that basis.

The Court: All right.

Mr. Fehringer: If Your Honor please, I am going to conserve your time because I know you have heard a great deal today from the lawyers, and much of what I have to discuss with the Court has already been resolved.

May I just simply make this statement to the Court on the subject of statements because I would like there not to be any confusion about this.

I feel that we are entitled to know, when a statement was made by a defendant, whether or not the government intends to use it because if it was illegally obtained there is a possibility of course that there were leads obtained from this statement which, it seems to me, we have a right then to investigate under the doctrine of the fruit of the forbidden tree.

So that my request here is manifestly fair. I feel that I am entitled to know about and see statements of all of the defendants that may have been made, either

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(Title of Cause)

To: John Livingston, Clerk, United States District Court, Southern District of New York.

Sir:

You are hereby notified that I appear for Max Bornstein, the defendant in the above entitled action.

Dated: New York, New York.

MELVIN N. FINE
Attorney for Defendant
24 Church Street
Paterson, N. J. 07505
(201) MU4-1138

September 20, 1970

Hon. Lloyd MacMahon
United States District Court
for the Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: *United States v. Manrite, et al.*

Dear Judge MacMahon,

I regret informing you that for the past month I have been trying to contact Paul Wolf, whom I originally appeared for in the above-entitled prosecution. I also temporarily appeared for Max Bornsten while he was seeking other counsel. I had always advised him that he would have to have counsel of his own; however, I felt an obligation to make sure he had secured independent counsel. I have not been able to contact either of these men. They no longer live at the addresses that I had for them, their telephones have been disconnected, and they have left no forwarding addresses. I am now fearful that they will not appear on August 5th, and I felt that I should immediately inform you of this.

I would be most happy to sit down and discuss this matter with you, if you felt that it would be helpful in any way.

Yours vey truly,
LIPSITZ, GREEN,
FAHRINGER, ROLL,
SCHULLER & JAMES
By Herald Price Fahringer

September 26, 1970

Hon. Lloyd MacMahon
United States District Court for
the Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: *United States v. Manarite, et al. Max Bornstein.*

Dear Judge MacMahon,

I was finally able to reach Max Bornstein and reminded him that he would have to have counsel of his own on October 5th when the above-entitled matter goes to trial. He acknowledged to me that he remembered that my appearance for him was only temporary and that he had been told that he would have to have counsel of his own at the time of October 5th. He plans to obtain counsel and be ready to go to trial on October 5th.

I have still not been able to locate Paul Wolf and have not heard from him, and I am afraid that he may not appear on October 5th.

In the meantime, Edward and Ferris Alexander have asked me to represent them and I plan to proceed to trial on October 5th as attorney for the Alexanders.

Respectfully yours,
HERALD PRICE FAHRINGER

Mr. Scott: We have prepared 8 copies. I believe that should be sufficient.

The Court: I think so. I think that is ample.

Mr. Wall: I don't have anything more.

Mr. Fahringer: Your Honor, may I bother you again? I have with me Mr. Melavitz from Minneapolis. He would like to appear with me as co-counsel. He represents Mr. Alexander out in Minneapolis.

I would like to move his admission for the purposes of this case. He is a member of the bar of the District Court of Minnesota, and the 8th Circuit Court of Appeals, together with, of course, the State Bar of Minnesota.

The Court: Motion granted.

Mr. Fahringer: May I just bring up one other matter that I would like to alert the Court to. We have in these supplemental bill of particulars which have been supplied to us that certain of the defendants have cooperated with the government and will be cooperating with the government.

Under the well-known Hoffa case and the Lewis case, the United States Supreme Court spoke about government informants and approved. But there is language in these cases that I feel an obligation to bring to the Court's attention in terms of protecting our record here.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FERRIS JACOB ALEXANDER,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

AFFIDAVIT IN SUPPORT OF MOTION
PURSUANT TO 28 USC SEC. 2255
72 Civ. 248

ROBERT J. MILAVETZ, being first duly sworn, deposes and says that:

1. I am an attorney and have assisted Harold Fahringer in the representation of Ferris J. Alexander throughout the trial of the above entitled matter.

2. I have conferred with Mr. Harold Fahringer, Ferris Alexander and Edward Alexander and I am familiar with facts pertaining thereto.

3. That this affidavit is submitted in support of the motion of defendant, Ferris J. Alexander, pursuant to 28 USC Section 2255 sworn to on January 19, 1972.

4. That Harold Price Fahringer has in fact represented Paul Wolf, Max Bournstein, Ferris Jacob Alexander and Edward Jacob Alexander. Exhibit A attached hereto and incorporated herein by reference.

5. That perhaps originally Harold Fahringer only intended to represent either Paul Wolf or Max Bournstein but when it appeared that Paul Wolf would not appear at the trial and that Max Bournstein had little in the way of funds, Harold Fahr-

inger agreed that he would represent Ferris and Edward Alexander.

6. That testimony would show that Harold Fahringer received retainers from both Ferris J. Alexander and Edward J. Alexander.

7. That at the commencement of the trial, Harold Fahringer continued to represent Edward J. Alexander and after the court granted the motion to sever Edward J. Alexander, Harold Fahringer stated on behalf of Edward Jacob Alexander, "May he also leave the courtroom and be continued on bail?" See Exhibit B attached herewith and incorporated herein by reference.

8. That Mr. Fahringer was not relieved from his duty to represent Max Bournstein until the time of the trial. See Exhibit C attached herewith and incorporated herein by reference.

9. That Mr. Fahringer has continued to represent Edward Alexander at least until the beginning of the year, 1972 when he filed a motion to dismiss the indictment against Edward Jacob Alexander herein. Copy Exhibit D attached herewith and incorporated herein by reference.

10. That although Harold Fahringer stated that he would only represent one of the Alexanders at the time of the trial he also represented that he would be in charge of both of their defenses.

11. The Government should not attempt to confuse the Court with the allegation that, "There is nowhere in the record an indication that Mr. Kennedy withdrew from the case." Mr. Kennedy never appeared at the trial. The fact that Mr. Kennedy represented either Ferris or Edward Alexander in the past is not relevant. Neither is it relevant that other counsel may have had conflicts of interest. It is apparent, however,

that the Government does not understand petitioner's allegations. Petitioner does not allege that there is necessarily a conflict of interest. On the other hand, simply because an attorney is only appearing with one defendant during a trial does not mean that there is no conflict of interest.

12. Petitioner alleges that there was a conflict of interest in this case because of two facts. A) Harold Fahringer had a dual loyalty to Ferris Alexander and his other clients, Paul Wolf, Max Bournstein and Edward Alexander. B) The dual loyalty interfered with Fahringer's ability to make decisions.

13. Fahringer had to consider whether or not to allow Edward Alexander to testify for his brother Ferris Alexander as Ferris had requested of him. Fahringer had to consider the extent of his cross-examination of the Government witnesses such as Bruce Valentine who alleged that he met Ferris Alexander in New York and in Minneapolis, Minnesota and the lady from the bank in Minneapolis who alleged that she had sold money orders to Ferris Alexander.

14. Harold Fahringer had to consider whether or not to confront these witnesses with Edward Alexander and what effect this would not only have on Ferris's case but what effect this would have on the possibility of Edward Alexander being tried. During the course of the trial, a mistrial was declared and again Harold Fahringer had to consider whether or not Paul Wolf might return and be tried in a new trial or go ahead on the same possibly contaminated jury. Fahringer waived without first conferring with petitioner. Fahringer had to consider whether or not Ferris Alexander should testify knowing that Ferris Alexander would have to testify that he did know Paul Wolf and Max Bournstein. He had to consider what effect this would have on their cases.

15. Petitioner alleges that these are questions not of trial strategy. Petitioner alleges that Fahringer could not make these decisions and other decisions objectively because he was fettered by his duties to his other clients.

16. The fact that Fahringer disclosed to the court that he may have a conflict of interest in representing Paul Wolf and Max Bournstein is of no moment to Petitioner's case. Perhaps even it should have pointed the need for the Court to make inquiry directly with Ferris Alexander. When it became apparent during the course of the trial that Fahringer would have to make certain decisions as to the extent of his cross-examination of Government witnesses, as to whether or not witnesses should be called and as to whether or not Ferris Alexander should testify, Fahrlinger should have disclosed his conflict to the Court. The Court could have then appointed another attorney to confer with Ferris Alexander and another attorney perhaps to confer with Edward Alexander.

17. Fahringer's conflict shackled him to such an extent that he could not even inquire of Edward Alexander as to what his testimony would be if he were called to testify on behalf of Ferris Alexander. Fahringer did advise Edward Alexander, however, not to testify and not to be available for a subpoena.

18. Regardless of the amount of documentary evidence alleged by the Government to be against petitioner, petitioner's Sixth Amendment right to adequate, effective assistance of counsel is not diminished. Defendant Ferris Alexander was entitled to counsel who was unhindered with any duty to protect any other persons. The greater the evidence against petitioner, the more compelling was petitioner's need for effective assistance of counsel.

FURTHER YOUR AFFIANT SAYETH NOT, save he makes this affidavit in support of a motion for a hearing pursuant to 28 USC Section 2255.

ROBERT J. MILAVETZ

Subscribed and sworn to before me this ..... day of February, 1972. — ....., Notary Public.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

vs.

SAMUEL S. MANARITE, et al.,
PAUL WOLF, MAX BORNSTEIN,
FERRIS JACOB ALEXANDER and
EDWARD JACOB ALEXANDER,
*Defendants*

---

NOTICE OF MOTION

Indictment No.
69 Cr. 747

Sir:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Herald Price Fahringer duly sworn to on the 28th day of February, 1970, and upon the indictment and all the other proceedings heretofore had herein, the undersigned will move this Court on behalf of the defendants, Paul Wolf, Max Bornstein, Ferris Jacob Alexander and Edward Jacob Alexander, at a Criminal Term for Motions to be held in the Federal Court-

house located at Foley Square, Borough of Manhattan, State of New York, for the following relief:

1) For an order directing certain discovery and inspection pursuant to Rule 16 of the Federal Rules of Criminal Procedure;

2) For an order requiring the Government to produce and deliver to the defendants all evidence favorable to them under the authority of *Brady v. Maryland*, 373 U.S. 83.

3) For an order suppressing any statements made by the defendants or in the alternative a hearing be conducted to determine the constitutional propriety of such statements pursuant to *Miranda v. Arizona*, 384 U.S. 436, and other related cases.

4) For an order suppressing certain evidence unlawfully seized from the defendants or in the alternative an order directing a hearing be conducted to determine all relevant issues connected with defendants' claims that certain evidence was seized from them unlawfully, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure;

5) For an order dismissing the indictment pursuant to Rule 12 of the Federal Rules of Criminal Procedure;

6) For an order dismissing the indictment on the grounds that Section 1465 of Title 18 is unconstitutional, and an order so declaring that section to be unconstitutional, and further dismissing the indictment on the grounds that the Court has no jurisdiction to try such an indictment pursuant to Rule 12 of the Federal Rules of Criminal Procedure;

7) For an order granting inspection of the Grand Jury Minutes pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure;

8) For an order granting a Bill of Particulars pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure;

9) For an order granting a severance and separate trials for these defendants under Rule 14 of the Federal Rules of Criminal Procedure;

10) That this Court grant such other and further relief as is just under all of the circumstances of this case.

Dated: Buffalo, New York, February 28th, 1970.

Yours, etc.,

HERALD PRICE FAHRINGER

Attorneys for Defendants,
Paul Wolf, Max Bornstein,
Ferris Jacob Alexander and
Edward Jacob Alexander

Office & P.O. Address
One Niagara Square
Buffalo, New York 14202

To: STEPHEN SCOTT
Asst. United States Attorney
Department of Justice
Federal Plaza
New York, New York

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PATRICK M. WALL, ESQ.,
Attorney for Defendant Luis Marti.

JAMES M. LA ROSSA, ESQ.,
Attorney for Defendants Richard J. Portola
and Carol Ann Portola.

MICHAEL P. DIRENZO, ESQ.,
Attorney for Defendant Dominick Constantine.

VICTOR A. ROBERTS, ESQ.,
Attorney for Defendant Phil Primet.

HOWARD L. JACOBS, ESQ.,
Attorney for Defendant Frank J. Del Rosso, Jr.
MILTON ADLER, ESQ.,
Attorney for Defendant Salvatore Puntasecca.
By: John P. Curley, Jr., Esq., of Counsel.
MELVIN M. FINE, ESQ., and
KALMAN, HARRIS & CEIST, ESQS.,
Attorneys for Defendant Max Bornstein.
ARNOLD E. WALLACH, ESQ.
Attorney for Defendant Vinny Cacace.
HERALD PRICE FAHRINGER, ESQ., and
ROBERT MILAVETZ, ESQ.
Attorneys for Defendants Ferris Jacob Alexander
and Edward Jacob Alexander.
Also Present:
Abraham H. Brodsky, Esq.

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One could argue that the Court was referring strictly to a written statement, but this is not what the Court said in its opinion. Mr. Kelly apparently is charged as a co-conspirator and is cooperating with the government and the government has indicated they intended to name him. With that in mind and the fact that in the short time I have had available, it appears to me that numerous of the co-defendants may have, and, in fact, from the discovery ordered by the Court, given by the government, numerous acts of co-defendants which could prejudice Mr. Bornstein in the eyes of the jury, and if he were to be tried with these co-defendants and have the co-defendant Kelly testify against him and others, his case could and very probably would be tainted by the balance of the tes-

timony, and I think it would be a miscarriage of justice as to Mr. Bornstein to force me on at this time and not to sever his case. I would like a ruling on this motion. I have other motions.

Mr. Scott: I have a notice of appearance by Mr. Fine just recently. However, I have in my files a notice of appearance for Mr. Bornstein filed by Mr. Fahringer. There is no date on it, but it was way back at the time this case was initiated, at the time of the arraignment. Mr. Fine simply filed his just a week or so ago, and the government opposes any motion for severance for that reason. If he was going to be the attorney of record he could have filed a notice of appearance months earlier. Mr. Fahringer, as far as we were concerned, was the attorney of record for Mr. Bornstein.

The Court: My recollection is Mr. Fahringer wrote the Court a letter asking to be relieved and I denied it on the ground that it came too late.

Mr. Scott: I did not receive a copy of the letter. I have a notice of appearance filed by Mr. Fahringer and have no withdrawal from him.

The Court: I will deny the motion.

What about the motion to sever?

Mr. Scott: The reasons given at that time were the Bruton problems. The government opposes the motion to sever on the ground there would be no Bruton problem here. If any statements of co-conspirators are used against the defendant Bornstein, no Bruton problem will exist.

The Court: I deny that motion at this time, again without prejudice to renew when, as and if the problem arises.

Does the government have any motions?

Mr. Scott: The government has no motions to make. It is my understanding the defendant Paul Wolf is not in court today. I would like to verify that?

Mr. Fahringer: I also wrote you a letter—I think it was two to three weeks ago—where I had advised that we had been unable to reach Mr. Wolf and I advised the Court today that he is not in court and I do not know where he is.

Mr. Scott: In view of that the government moves at this time for forfeiture of Mr. Wolf's bail and makes application for a bench warrant.

The Court: Motion granted.

Mr. Scott: The government moves for a severance of Mr. Wolf in this case.

The Court: Motion granted.

Mr. Scott: The government moves for a severance of the defendants Phil Primet, Frank J. Del Rosso, Jr., James Kelly, Edward Jacob Alexander, and Vinny Caccace.

Mr. Wallach: I don't mean to be rude, but I represent Caccace, I am his attorney. It comes as a surprise to me. I understand the government wishes to sever as to Caccace?

The Court: Yes, that is what the motion is.

Mr. Wallach: I made such a motion before. I certainly can't oppose that on behalf of Caccace.

The Court: Motion granted.

Mr. Scott: As to the other defendants, your Honor?

The Court: As to all you mentioned.

Mr. Wallach: May Mr. Caccace then leave the courtroom, and may his parole be continued?

The Court: Yes.

Mr. Fahringer: On behalf of Edward Jacob Alexander, may he also leave the courtroom and be continued on his bail?

The Court: Yes.

Mr. Wallach: I submitted a request under Rule 2423 as to the jury. I no longer have need of that, but I showed it to co-counsel, and I assume that any application made by one defendant will inure to all. So I leave that with your Honor and counsel.

The Court: Do you have any other application?

Mr. Scott: The government respectfully requests that Mr. James McShane of the Federal Bureau of Investigation be permitted to sit at counsel table during the course of this trial. This is a very complicated conspiracy with numerous defendants. Mr. McShane is the agent in charge of the investigation. He will be testifying, your Honor. However, we do not believe that there will be any prejudice to the defendants by his being at counsel table and I respectfully request that.

The Court: Can you give us some indication without prejudicing your case what the nature of his testimony will be?

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Feb. 14, 1972

"The files and records of this Court show beyond preadventure that Harald Price Fahringer, Esq., did not represent Ferris Jacob Alexander in any real sense upon the trial until he had ceased to represent other defendants. Additionally, Robert J. Milavetz, Esq., represented Ferris Jacob Alexander throughout the trial. The record is plain that on the trial proper Mr. Fahringer represented only Ferris Jacob Alexander. The supporting affidavit of James M. LaRossa, Esq., who has since withdrawn from this application because "the manner in which Mr. Alexander seeks to secure habeas corpus relief is wholly incompatible with my own standands of professional responsibility," and the affidavit of Mr. Milavetz, wholly fails to show any facts pointing to any specific instance of prejudice or real conflict of interest. In short, this application is frivolous and is therefore denied without a hearing. 28 USC 2255. *United States v. Lovano*, 420 F. 2d 769 (2 Cir.), cert. denied, 397 U.S.

1071 (1970). *Hussey v. LaVallee*, 428 F. 2d 457 (2 Cir. 1970), cert. denied, 460 U.S. 995 (1971).

So Ordered.

LLOYD F. MacMAHON
U. S. D. J.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of April, one thousand nine hundred and seventy-two.

Present: Hon. Henry J. Friendly, Chief Judge; Hon. J. Joseph Smith, Hon. James L. Oakes, Circuit Judges.

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FERRIS JACOB ALEXANDER,
*Petitioner-Appellant,*

v.

UNITED STATES OF AMERICA,
*Respondent-Appellee.*

---

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO, Clerk

(A true copy — A. Daniel Fusaro, Clerk.)

LE COPY

Supreme Court, U. S.
FILED
JUL 7 1972
JR., CLERK

IN THE

# Supreme Court of the United States

October Term 1971

No. 71-1480

FERRIS JACOB ALEXANDER
*Petitioner*

vs.

UNITED STATES OF AMERICA

## REPLY BRIEF OF PETITIONER

ROBERT J. MILAVETZ
1055 Dain Tower
Minneapolis, Minnesota
*Attorney for Petitioner*

July, 1972

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

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vs.

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## REPLY BRIEF OF PETITIONER

The Government's memorandum in opposition distorts both fact and logic in its attempt to sustain the rulings below.

The trial court's finding of no conflict of interest on the record (Pet. 11) is not a basis to deny appellant's petition without a hearing. Petitioner alleged that a hearing would reveal his attorney Fahringer's divided loyalty. (App. 5) Fahringer submitted no affidavit upon which the Court could make a finding contrary to the allegations of the petitioner. The trial court went outside of the record to make its ruling. Fahringer represented four co-defendants Max Bornstein, Paul Wolf, Edward Alexander and Ferris Alexander prior to

the trial of petitioner. The extent of Fahringer's representation of Bornstein, Wolf and Edward Alexander could not be determined from the record. An attorney does more than merely attend Court proceedings and file pleadings which make up the record. In addition, an attorney engages in an attorney-client relationship where the client discloses to the attorney privileged statements concerning his involvement with the case and his relationships with co-defendants and possible witnesses. An attorney and his client discuss trial strategy prior to the trial. An attorney agrees to defend the client, giving him his undivided loyalty and exerting his best efforts in securing the client's acquittal. These out of court conferences are not part of the record.

The record could not disclose the loyalties which existed between Fahringer and his four clients while Fahringer was a counsel for Ferris Alexander during the trial.

The trial judge ruled (Pet. 11) the files and records demonstrate that Mr. Fahringer did not represent petitioner in any real sense until he had ceased to represent other defendants.

The files and records do not show that Fahringer ever ceased to represent the other defendants.

The only defendant Fahringer ceased to represent prior to the trial was Max Bornstein. (App. 23). But even as to Max Bornstein the record does not disclose Fahringer abandoned his loyalties to Max Bornstein. The record does not disclose that Fahringer was relieved from his duties to Paul Wolf. The trial court and government assume Fahringer severed his duties to Wolf although no Court order discharged Fahringer and no affidavit of either Fahringer or Wolf supports this allegation.

The record discloses that Fahringer represented Edward Alexander during the time of Ferris Alexander's trial. Foot-

note 2 of the Government's memorandum in opposition at page 3 states, "The indictment against Edward Alexander was subsequently dismissed." The government neglected to add that the dismissal of Edward was on the motion of Fahringer filed several months after Ferris Alexande s trial. The Government knows Fahringer was Edward Alexander's attorney at the time of the trial, yet it distorts the record to deceive this court and claims that Fahringer ceased to represent other defendants before the trial. The record does not disclose that Fahringer did not have a divided loyalty. Fahringer filed no affidavit in these proceedings.

Although the fact of Fahringer's past representations was not hidden from petitioner, the consequences of his divided loyalty were unknown to petitioner. (App. 4). Petitioner did not know of the inability of the Government's witness to identify him from his brother Edward Alexander. Mere knowledge of the facts does not constitute a waiver. Waiver of a constitutional right to effective assistance of counsel requires an informed, knowing, intelligent appreciation of the legal consequences. Petitioner did not know Fahringer's judgment would be affected by his other loyalties (App. 17). Petitioner did not know that Fahringer's dual allegiance would prevent petitioner from calling witnesses or testifying. (App. 12).

The government's memorandum misstates petitioner's contention (p. 2). Petitioner does not contend that he was denied effective representation of counsel because prior to trial one of his attorneys had represented co-defendants. Petitioner contends that *during* his trial his attorney's allegiance to co-defendants caused by his current and past representations deprived him of effective assistance of council. (App. 17).

At the trial, petitioner was represented by one attorney, Fahringer, who was assisted by this writer. (App. 15). No

affidavit was submitted by the government or Fahringer to show that Fahringer was not solely and primarily in charge of petitioner's trial. The record shows no part in the trial played by this writer. Fahringer's inability to give petitioner his unhindered judgment in conducting the trial was not made known to petitioner or to this writer because it was not revealed by Fahringer or inquired into by the trial court. Fahringer's basic conflict of protecting Edward Alexander at the expense of petitioner could not have been foreseen by anyone but the government. The government did not disclose its witness's inability to identify petitioner from Edward until the evening before the witness testified, when the Grand Jury testimony was supplied to Fahringer. By this time the case against petitioner was almost closed. Not until then could Fahringer realize he could save petitioner by implicating Edward. Fahringer, however, never disclosed his divided loyalty could interfere with his decision not to call Edward Alexander as a witness and to recommend to Ferris Alexander not to testify. (App. 17). The petitioner was never advised of the consequences of allowing Fahringer to represent him which would result from Fahringer's divided loyalties and could not know that Fahringer's advice was not given solely for petitioner's benefit. Petitioner was precluded from effectively raising the defense of misidentification because his attorney also represented a severed co-defendant and the government did not disclose the witness's confusion in identification prior to trial but instead caused the severance.

The guarantee every citizen has to a fair trial is assured by an advocate who is independent of a duty to protect any person other than his client. Our Courts, too, must be vigilant to protect every accused's right to an effective attorney, unhindered by dual allegiance.

If a trial court is indifferent to these most precious rights symbolized by this case all of our rights are imperiled. History has taught us that our rights are not self-enforcing and they must be scrupulously protected by our Courts or else they will wane.

Respectfully submitted,

ROBERT J. MILAVETZ
1055 Dain Tower
Minneapolis, Minnesota
*Attorney for Petitioner*

July, 1972